"Fateful Moment In the History of A Free Country"

From the Historic Black and Douglas Dissents in the Communist and SACB Cases, Pages 2-3.

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The Supreme Court Betrays the U.S. to Its Real Enemies

The heart of the intricate and savage Internal Security Act lies in the registration provisions which the Supreme Court upheld 5-to-4 last Monday. These rest in turn, to a considerable degree, on proof by parallelism. That is to say, the Subversive Activities Control Board set up by the act, in determining which organizations must register with it as Communistic, studies the extent to which they follow party line. This is what led President Truman in vetoing the measure * on September 22, 1950, to say:

"Obviously, if this law were on the statute books, the part of prudence would be to avoid saying anything that might be construed by someone as not deviating sufficiently from the current Communist propaganda line. And since no one could be sure in advance what views were safe to express, the inevitable tendency would be to express no views on controversial subjects."

As In Dante's Hell

The Supreme Court's decision will hurt the best interests of the United States in three ways. The first and most important was that indicated by the Truman veto message. The decision will tend to inhibit political discussion and activity. The inhibitory potential of the Act takes on formidable outlines as one examines its ingeniously interlocked provisions. Its area of jurisdiction, like Dante's Hell, is divided into various degrees of damnation. Three categories of organizations are made subject to the inquisitorial eye of the Subversive Activities Control Board—the very name would make Jefferson wince. The condemned are divided into Communist "action", Communist "front" and Communist "infiltrated" organizations. All three are required to wear the scarlet letter; they are forbidden to mail any publication or other communication or make any radio or TV broadcast, without plainly labelling it as "disseminated by [name], a Communist organization." The first two categories must register, and on registering their members lose the right to travel (even *application* for a passport becomes a crime), to work in defense facilities, or to hold government jobs; they are, in short, reduced to second class citizens. Communist "action" organizations, though not the other two categories, must register their members as well as their officers, and failure to register is punishable by draconian penalties: a fine of $10,000 *and* a prison sentence of five years may be imposed for *each day* of failure to register. A delay of 30 days could mean a fine of $300,000 and 150 years in jail; longevity will henceforth be a prime requirement for American radicals. Such sanctions will not encourage marching in May Day parades.

*** A Congress afraid to vote against anything labelled anti-Communist passed it over Truman's veto. Among those voting to override in the House were Nixon and Kennedy, the former a sponsor of the measure, long known as the Mundt-Nixon bill.**

The Bad Example We Set

"Now, when this country is trying to spread the high ideals of democracy all over the world—ideas that are revolutionary in many countries—seems to be a particularly inappropriate time to stifle First Amendment freedoms in this country. The same arguments that are used to justify the outlawry of Communist ideas here could be used to justify an outlawry of the ideas of democracy in other countries."

—Mr. Justice Black dissenting in Communist Party v. Subversive Activities Control Board.

The second way in which the Supreme Court hurt our country was in defacing its "image" abroad. Even in the most despotic country, every citizen is free to *agree* with the government. The test is freedom to oppose it, and to oppose it fundamentally. Just as there will be no freedom in the Soviet bloc until there is freedom to be *anti*-Communist, so the measure of freedom here is the freedom to *be* Communist. By this test, Great Britain, France and Italy with legal and open Communist parties are still free countries while we descend to the bastard zone with South Africa among those which impose outlawry of one kind or another on the Communists, and their sympathizers. How can we ask liberalization of the Diem regime or mollify the brutal police state imposed on Korea by the new military junta when we ourselves revert to mechanisms of suppression?

"If there be any among us," Jefferson said in his first Inaugural "who would wish to dissolve this Union or to change its Republican form of government, let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it." If there be any such among us today they'd better hurry down and register. Mr. Justice Frankfurter and his four colleagues no longer have that same faith in reason. We are participants in a slow degeneration from the faith that once made America a shining light in the eyes of mankind. In a country where freedom of the press was regarded as a foundation stone of liberty, we now have an act which requires of all registered organizations the "listing, in such form and detail as the Attorney General shall by regulation prescribe, of all printing presses and machines including but not limited to rotary presses . . . offsets . . . ditto machines . . . or any mechanical devices . . . capable of being used to produce or publish printed matter or material." One would have to go to the statute books of the Franco or Salazar regimes to match this meticulous frenzy in fear of the printed word. Is this America?

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Black's Historic Dissent in the Subversive Activities Control Board Case . . .

"I do not believe that it can be too often repeated that the freedoms of speech, press, petition and assembly guaranteed by the First Amendment must be accorded to the ideas we hate or sooner or later they will be denied to the ideas that we cherish. The first banning of an association because it advocates hated ideas—whether that association be called a political party or not—marks a fateful moment in the history of a free country. That moment seems to have arrived for this country. . . .

"This whole [Internal Security] Act, with its pains and penalties, embarks this country, for the first time, on the dangerous adventure of outlawing groups that preach doctrines nearly all Americans detest. When the practice of outlawing parties and various public groups begins, no one can say where it will end. In most countries such a practice once begun ends with a one-party government. There is something of tragic irony in the fact that this Act, expressly designed to protect this nation from becoming a 'totalitarian dictatorship' with 'a single political party,' has adopted to achieve its laudable purpose the policy of outlawing a party —a policy indispensable to totalitarian dictatorships. . . .

Act Called Bill of Attainder

"In my judgment, the Act here under consideration is unconstitutional on at least three grounds in addition to its direct conflict with the self-incrimination provisions of the First Amendment. It is, in the first instance, a classical bill of attainder which our Constitution in two places prohibits, for it is a legislative act that inflicts pains, penalties and punishments in a number of ways without a judicial trial. The legislative fact-findings as to Communist activities, which the Court—despite the constitutional command for trial of such facts by a court and jury—accepts as facts, supply practically all of the proof needed to bring the Communist Party within the proscriptions of the Act. The Act points unerringly to the members of the Party as guilty people who must be penalized as the Act provides. At the same time, these legislative fact-findings fall little short of being adequate in themselves to justify a finding of guilt against any person who can be identified, however faintly, by an informer, as ever having been a member of the Communist Party. Most of whatever is lacking in the legislative fact-findings is later supplied by administrative fact-findings of an agency [the Subversive Activities Control Board] which is not manned by independent judges, and which does not have to observe the constitutional right to trial by jury and other trial safeguards unequivocally commanded by the Bill of Rights. Yet, after this agency has made its findings and conclusions, neither its findings of fact nor the findings of fact of the legislative body can subsequently be challenged in court by any individual who may later be brought up on a charge that he failed to register as required by the Act and the Board. The Act thus not only is a legislative bill of attainder but also violates due process by short-cutting practically all of the Bill of Rights, leaving no hope for anyone entangled in this legislative-administrative web except what has proved in this case to be one of the most truncated judicial reviews that the history of this Court can afford.

Violation of First Amendment

"I think also that this outlawry of the Communist Party and imprisonment of its members violates the First Amendment. The question under that Amendment is whether Congress has power to outlaw an association, group or party either on the ground that it advocates a policy of violent overthrow of the existing government at some time in the distant future or on the ground that it is ideologically subservient to some foreign country. In my judgment neither of these factors justifies an invasion of rights protected by

When Jacobins Were The Bogies

". . . the Federalist Sedition Act . . . did not go as far in suppressing the First Amendment freedoms of Americans as do the Smith Act and the Subversive Activities Control Act. All the fervor and all the eloquence and all the emotionalism and all the prejudice and all the parade of horrors . . . were not sufficient in 1798 to persuade the members of Congress to pass a law which would directly and unequivocally outlaw the party of Jefferson, at which the law was undoubtedly aimed. The same arguments were then made about the 'Jacobins,' meaning the Jeffersonians, with regard to their alleged subservience to France, that are made today about the Communists with regard to their subservience to Russia."

—Black's dissent in Communist Party v. SACB

Black Sees A Swarm of Informers in the Wake of the Court's Smith Act Ruling

"In 1799 the English Parliament passed a law outlawing certain named societies on the ground that they were engaged in 'a traitorous Conspiracy . . . in conjunction with the Persons from Time to Time exercising the Powers of Government in France. . . .' One of the many strong arguments made by those who opposed the enactment of this law was stated by a member of that body, Mr. Tierney:

" 'The remedy proposed goes to the putting an end to all these societies together. I object to the system, of which this is only a branch. . . . These attempts lead to consequences of the most horrible kind. . . . Those whom they cannot prove to be guilty, they will punish for their suspicion. To support this system, we must have a swarm of spies and informers. . . .'

"The decision in this case, in my judgment, dramatically illustrates the continuing vitality of this observation. The conviction of the petitioner here is being reversed because the Government has failed to produce evidence the Court believes sufficient to prove that the Communist Party presently advocates the overthrow of the Government by force. The Government is being told, in effect, that if it wishes to get convictions under the Smith Act, it must maintain a permanent staff of informers who are prepared to give up-to-date information with respect to the present policies of the Communist Party. . . . I do not disagree with the wisdom of the Court's decision to compel the Government to come forward with evidence to prove its charges in each particular case. But I think that it is also important to realize the over-riding pre-eminence that such a system of laws gives to the perpetuation and encouragement of the practice of informing. . . . I have always thought that this Government was built upon a foundation strong enough to assure its endurance without resort to practices which most of us think of as being associated with totalitarian governments."

—Mr. Justice Black concurring in Noto v. U.S.

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...Calls Outlawry of A Party 'Fateful Moment in The History of A Free Country'

the First Amendment. Talk about the desirability of revolution has a long and honorable history, not only in other parts of the world, but in our own country. This kind of talk, like any other, can be used at the wrong time and for the wrong purpose. But under our system of Government, the remedy for this danger must be the same remedy that is applied to the danger that comes from other erroneous talk—education and counter argument. If that remedy is not sufficient, the only meaning of free speech must be that revolutionary ideas will be allowed to prevail.*

Sympathy with A Foreign Regime

"This conclusion is not affected by the fact that those advocating a policy of revolution are in sympathy with a foreign government. If there is one thing certain about the First Amendment it is that this Amendment was designed to guarantee the freeest interchange of ideas about all public matters and that, of course, means the interchange of *all* ideas, however such ideas may be viewed in other countries and whatever change in the existing structure of government it may be hoped that these ideas will bring about . . .

"The freedom to advocate ideas about public matters through associations of the nature of political parties and societies was contemplated and protected by the First Amendment. The existence of such groups is now, and for centuries has been a necessary part of any effective promulgation of beliefs about governmental policies. And the destruction of such groups is now and always has been one of the first steps totalitarian governments take. Within recent months we have learned of such practices in other countries. Only a few weeks ago an executive edict outlawing all parties, groups and associations all the way down through Rotary Clubs was issued in a country where the government is largely in the hands of a single man . . .

*** Cf. Gitlow v. N.Y. 'If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way.' Mr. Justice Holmes, dissenting.**

There Are Some Countries . . .

"I am ready to admit that strong arguments can be made for saying that Governments in general should have power to suppress speech and press. These arguments are particularly strong in countries where the existing Government does not represent the will of the people. . . . It is plain that there are Governments in the world today that desperately need to suppress such protests for they probably could not survive a week or even a day if they were deprived of the power to use their informers to intimidate, their jails to imprison and their firing squads to shoot their critics. In countries of that kind, repressive measures like the Smith Act and the Subversive Activities Control Act are absolutely necessary. . . . But in a democracy like ours, such laws are not only unnecessary but also constitute a baseless insult to the patriotism of our people."

—Black dissenting in Communist Party v. SACB

"I am compelled to say in closing that I fear that all the arguments and urgings the Communists and their sympathizers can use in trying to subvert Americans to an ideology wholly foreign to our habits and our instincts are far less dangerous to the security of this Nation than laws which embark us upon a policy of repression by the outlawry of minority parties because they advocate radical changes in the structure of Government. This widespread program for punishing ideas on the ground that they might impair the internal security of the Nation not only sadly fails to protect that security but also diverts our energies and thoughts from the many far more important problems that face us as a Nation in this trouble world.

"I would reverse this case and leave the Communists free to advocate their beliefs in proletarian dictatorship publicly and openly among the people of this country with full confidence that the people will remain loyal to any democratic Government truly dedicated to freedom and justice—the kind of Government which some of us still think of as being 'the last hope of earth'."

—Mr. Justice Black dissenting in Communist Party v. SACB.

Cynical Reflection of Mark Twain's About American Freedom Cited by Douglas

"When we allow petitioner to be sentenced to jail for six years for being a 'member' of the Communist Party, we make a sharp break with traditional concepts of First Amendment rights and make serious Mark Twain's lighthearted comment that 'It is by the goodness of God that in our country we have those three unspeakably precious things: freedom of speech, freedom of conscience, and the prudence never to practice either of them.'

"Even the Alien and Sedition Laws—shameful reminders of an early chapter in intolerance—never went so far as we go today. They were aimed at conspiracy and advocacy of insurrection and at the publication of 'false, scandalous and malicious' writing against the Government. . . . There is here no charge of consipracy, no charge of any overt act to overthrow the Government by force and violence, no charge of any other criminal act. . . .

"We legalize today guilt by association, sending a man to prison when he committed no unlawful act. . . . The case is not saved by showing that petitioner was an active member. None of the activity constitutes a crime. . . . Not one single illegal act is charged to petitioner. That is why the essence of the crime covered by the indictment is merely belief—belief in the proletarian revolution. . . .

"Of course, government can move against those who take up arms against it. Of course, the constituted authority has the right of self-preservation. But we deal in this prosecution of Scales only with the legality of ideas and beliefs, not with overt acts. The Court speaks of the prevention of 'dangerous behavior' by punishing those 'who work to bring about that behavior.' That formula returns man to the dark days when government determined what behavior was 'dangerous' and then policed the dissidents for tell-tale signs of advocacy. What is 'dangerous behavior' that must be suppressed in its talking stage has had a vivid history on this Continent. The British colonial philosophy was summed up by Sir William Berkeley who served from 1641 to 1677 as Virginia's Governor: "I thank God, there are no free schools nor printing, and I hope we shall not have these hundred years; for learning has brought disobedience and heresy and sects into the world, and printing has divulged them. . . ."

—Mr. Justice Douglas dissenting in Scales v. U.S.

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Teaching Our Crypto-Fascists How To Get Around the Bill of Rights

(Continued from Page One)

"It is argued," Mr. Justice Frankfurter said for the majority, "that if Congress may constitutionally enact legislation requiring the Communist Party to register, to list its members, to file financial statements, and to identify its printing presses, Congress may impose similar requirements upon any group which pursues unpopular political objectives or which expresses an unpopular political ideology. Nothing which we decide here remotely carries such an implication." Never was a learned man so blind to the obvious lessons of history. Harry Truman showed more insight when he warned Congress such legislation was "a clear and present danger" to our institutions (see box on this page). Here we come to the third way in which this decision harms our country. At a time when right wing paranoid organizations like the Birch Society are mushrooming, when our military and intelligence bureaucracies are more and more permeated with similar views, a majority of the Supreme Court has shown these crypto-Fascist forces how they can get around the Bill of Rights and future judges how easily the First Amendment may be "balanced" away.

Murky Principles Make Murky Law

The majority has betrayed America to its real enemies, those who would destroy freedom in the name of anti-Communism. The betrayal was made the more inexcusable by the legal circumstances. The framers of the Internal Security Act realized that under the Fifth amendment it was doubtful whether they could force Communists to register since by such registration they would be incriminating themselves. So they put a Section 4 (f) in the statute which says that no one shall be held guilty of a crime merely because they were a member or an official of the Communist party. When the Court finally got around to the registration provisions, it also had before it, in the Scales and Noto cases, the first convictions under the membership clause of the Smith Act. These membership convictions had two hurdles to overcome. One was this Section 4 (f) of the Internal Security Act which says that membership "per se" is not a crime and the other was the basic legal principle that guilt in our law is supposed to be individual. The majority got past both hurdles by rewriting the Smith Act to mean that membership was criminal only if "active" and "knowing." *

But having held that Section 4 (f) was no bar to a prosecution for membership, the Court seemed bound to hold that Communists could not be forced to register since this might be their first step toward prison. This would have disposed of the Subversive Activities Control Board. Frankfurter and the majority, however, divorced the issue of registration from the issue of self-incrimination and said they could not pass on the latter until some Communist was actually arrested for failure to register. By delaying the test, they allow the SACB to move fully into operation. It may be years until the Fifth Amendment question comes up; it is not even clear whether it can come up in a meaningful form once that registration has been upheld. Eventually the Court may decide, as I think this one would, that no Communist can be forced to register. But in the meantime the SACB will be well-established, the mere initiation of proceedings against accused "front" organizations will be enough to destroy them, and the listing of organizations and names will give this country a new and more noxious form of blacklisting with which to threaten dissenters and non-conformists.

Truman's Forgotten Warning

"Laws forbidding dissent do not prevent subversive activities; they merely drive them into more secret and more dangerous channels. . . . Once a government is committed to the principle of silencing the voice of opposition, it has only one way to go and that is down the path of increasingly repressive measures, until it becomes a source of terror to all its citizens and creates a country where everyone lives in fear. We must, therefore, be on our guard against extremists who urge us to adopt police state measures. Such persons advocate breaking down the guaranties of the Bill of Rights in order to get at the Communists. They forget that if the Bill of Rights were to be broken down, all groups, even the most conservative, would be in danger from the arbitrary power of Government."

—Truman to Congress August 8, 1950.

*** We still don't understand, however, why Scales (who quit the Party after Hungary) goes to jail for six years while Noto (still a party functionary) goes free; murky principles make murky law.**

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